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11  
12 UNITED STATES BANKRUPTCY COURT  
13  
14 NORTHERN DISTRICT OF CALIFORNIA  
15  
16 SAN FRANCISCO DIVISION  
17

18 In re  
19  
20 WAUKEEN MCCOY,  
21  
22 Debtor.

Case No. 14-30381 HLB  
Chapter 11 (Converted from Ch. 13)

**URBAN GREEN INVESTMENTS, LLC'S  
REPLY TO DEBTOR'S OPPOSITION TO  
UGI'S MOTION FOR ORDER  
DIRECTING RELEASE OF ESCROWED  
FUNDS, OR IN THE ALTERNATIVE  
COMPELLING DEBTOR TO EXECUTE  
ESCROW CANCELLATION  
INSTRUCTIONS**

Date: November 20, 2014  
Time: 10:00 a.m.  
Crtrm: 23  
Judge: Hon. Hannah L. Blumenstiel  
U.S. Bankruptcy Court  
235 Pine St., 19th Fl.  
San Francisco, CA 94104

23  
24 **I. INTRODUCTION**

25 Creditor Urban Green Investments, LLC ("UGI") hereby submits its reply in  
26 opposition to Waukeen Q. McCoy's (the "Debtor") untimely opposition to UGI's Motion for  
27 Order Directing Release of Escrowed Funds, or in the Alternative Compelling Debtor to Execute  
28 Escrow Cancellation Instructions (the "Motion"). As a preliminary matter, the Debtor's

1 opposition is woefully past due, as it was required to be filed and served on November 6, 2014.  
2 See Bankruptcy Local Rule 9014-1(c). It was filed on November 15, 2014 at 11:14 p.m. UGI  
3 contends the opposition should be disregarded for being untimely, *i.e.*, over ten days late.

4 With regard to the “merits,” Debtor’s opposition fails to raise any legal or factual  
5 impediment to the granting of UGI’s Motion. As set forth below, the purchase contract  
6 specifically provides a mechanism for the release of UGI’s escrow deposit by judicial decision.  
7 Second, this Court is not required to uphold the general arbitration provision under applicable  
8 Ninth Circuit law, and the general arbitration clause does not apply in this instance. Third, with  
9 respect to the Debtor’s cryptic unsubstantiated innuendos that somehow UGI interfered with its  
10 own purchase contract, no one at UGI ever spoke to Kenneth Page, Craig Lipton or MF Fund II,  
11 LLP, or MF Fund III, LLP, both of which are cited in the opposition brief.

12 Factually, it is undisputed that Kenneth Page (“Page”) and Buena Vista Park, LLC  
13 (“Buena Vista”) obtained an order for relief from the automatic stay on June 24, 2014 to foreclose  
14 on the Property.<sup>1</sup> The Debtor did not oppose the motion for relief by Page and Buena Vista. It is  
15 also undisputed that the Debtor’s adversary complaint against Page and Buena Vista was  
16 dismissed by this Court on November 14, 2014. *See*, Adversary Proceeding No. 14-03094,  
17 Docket Entry No. 26. Moreover, on August 7, 2014, this Court entered the Order Denying  
18 Motion for Temporary Restraining Order, Adversary Proceeding Docket No. 14, finding that  
19 Debtor “[h]as failed to demonstrate that he would suffer irreparable harm if the scheduled  
20 foreclosure sale proceeds. Plaintiff [Debtor] did not oppose separate motions for relief from stay  
21 filed by the holders of the first and second deeds of trust on the subject property, and thereby  
22 acquiesced to the foreclosure.” *Id.* at ll 21-26. Further, this Court stated in the same order: “The  
23 Court also finds that plaintiff [Debtor] failed to establish at the private sale he advocates is likely  
24 to close.” It is undisputed that UGI did not breach the purchase contract and is entitled to an  
25 order authorizing the return of its deposit of \$50,000.<sup>2</sup>

26  
27 <sup>1</sup> Capitalized terms are as defined in UGI’s Motion.

28 <sup>2</sup> UGI requests the Court to take judicial notice of the pleadings in this case and the related  
adversary proceeding as referenced herein.

1     **II.     REPLY STATEMENT OF FACTS**

2             The agreement at issue was the January 10, 2014 Contract for the Sale and  
3     Purchase of Real property between UGI and the Debtor (the “Purchase Contract”). As noted in  
4     UGI’s Motion, it made an initial deposit of \$50,000 and the Debtor at no point in this case, or  
5     even in his opposition has any evidence that the deposit is his property or property of the  
6     bankruptcy estate.

7             The Purchase Contract contains the following provisions in the Contract  
8     Addendum No. 1:

9             1.     (\*\*) Buyer shall have 15 days from acceptance [January 1,  
10     2014] to approve all documents, disclosures, and/or inspections  
11     pursuant to this contract.

12             3.     Close of Escrow shall be the later date of (i) 45 days after  
13     Acceptance, or (ii) 10 days after the escrow company has confirmed  
14     that it has receive valid payoff demands, release, and/or  
15     reconveyance documents from all lienholders and that clear title can  
16     be delivered.

17     These two contingencies to the closing of the escrow for the Purchase Contract were never  
18     satisfied by the Debtor, nor did UGI waive any of these contingencies. *See*, Declaration of David  
19     P. McCloskey, filed concurrently herein, p. 2, ¶¶ 2,3. Page and Buena Vista completed a  
20     nonjudicial foreclosure on their deed of trust on the Property on August 8, 2014. Accordingly,  
21     the sale of the Property became an impossibility on August 8, 2014.

22             At page 3 of Debtor’s opposition, he cryptically alleges that “[t]here were  
23     improper and possibly illegal communications with Kenneth Page, Craig Lipton and MF Fund III,  
24     LP, the buyer at the foreclosure sale that interfered with the contract between Mr. McCoy and  
25     UGI.” Thereafter, Debtor also contends, without any evidence, UGI colluded with MF Fund II,  
26     LP to not close the escrow. These conclusory allegations have no merit in that at no time did UGI  
27     have any conversations with Mr. Page, Mr. Lipton, MF Fund II, LP or MF Fund, III, LP. *See*,  
28     McCloskey Declaration, p. 2, ¶ 4. Finally, Debtor contends that he was proceeding with a motion  
   to sell the Property free and clear of liens. However, a review of the docket shows that Debtor’s  
   motion to sell was not filed until July 21, 2014, Docket Entry No. 69 which was more than a  
   month after this Court granted Page and Buena Vista relief from the automatic stay on June 17,

1 2014. This Court subsequently held on August 8, 2014 that the Debtor failed to establish that the  
2 deal he was advocating with UGI was likely to close. A review of the Court's docket shows that  
3 the Debtor's motion to sell was never heard.

4 **III. ARGUMENT**

5 Debtor has failed to provide any legal or factual opposition to the relief requested  
6 by UGI.

7 **A. The Specific Language Regarding the Return of the Deposit Controls Over**  
8 **the General Arbitration Provision and Thus Arbitration is Not Required for**  
9 **the Return of the Security Deposit.**

10 As cited in UGI's Motion, paragraph 5 of the Purchase Contract states, "Release of  
11 funds from escrow will require mutually consistent signed instructions from both Buyer and  
12 Seller, or the rendering of a judicial decision or arbitration award authorizing the release." This  
13 specific contractual language applicable to the escrow deposit prevails over the general arbitration  
14 clause. *Prouty v. Gores Technology Group* (2004) 121 Cal.App.4<sup>th</sup> 1225, 1235 where the  
California Court of Appeal stated as follows:

15 In this circumstance, under well-established principles of contract  
16 interpretation, when a general and particular provision are  
17 inconsistent, the particular and specific provision is paramount to  
18 the general provision. (Code of Civ. Proc., § 1859; Civ. Code  
§ 3534; *National Ins. Underwriters v. Carter* (1976) 17 Cal.3d 380,  
386 ...)

19 Similarly, the Restatement of Law – Contracts at section 203 titled "Standards of  
20 Preference in Interpretation" provides:

21 In the interpretation of a promise or agreement or a term thereof,  
22 the following standards of preference are general applicable:

23 (c) specific terms and exact terms are given greater weight than  
general language;

24 In this instance, paragraph 5 provides the language for the specific handling of the security  
25 deposit. It provides that the security deposit can be released by either a judicial decision or  
26 arbitration award. Thus, this Court has the authority to decide the release of the escrow deposit,  
27 and arbitration is not required.  
28

1           **B. This Court is Not Required to Enforce the General Arbitration Provision in**  
2           **the Purchase Agreement.**

3           Debtor contends that paragraph 29 of the Purchase Agreement requires the Court  
4           to deny hearing this Motion and requiring UGI to proceed with mandatory arbitration. A  
5           bankruptcy court has the discretion to deny enforcement of a pre-petition arbitration agreement in  
6           core proceedings. *Continental Insurance Company v. Thorpe Insulation Company, etc.*, 671 F.3d  
7           1011, 1021-1023 (9<sup>th</sup> Cir. 2012) In *Thorpe*, the Ninth Circuit noted that in core proceedings the  
8           bankruptcy court has discretion to deny enforcement of an arbitration agreement. *Id.* at 1021.  
9           The Ninth Circuit's explanation is that the bankruptcy court has the discretion to deny a pre-  
10          petition arbitration agreement is if the arbitration would conflict with the underlying purposes of  
11          the Bankruptcy Code. In this case, the Court has to find that the escrow deposit is not property of  
12          the estate, a core matter. UGI contends it is not, based upon the authority that UGI cited in its  
13          Motion. Second, while UGI contends that the Debtor's claims of contractual interference have no  
14          support factually or legally, by making such a contention, the Debtor invokes core claims. *See*,  
15          11 U.S.C. § 157(b)(2)(A), (O). Accordingly, UGI contends that this Court has the discretion to  
16          deny the general arbitration provision.

17          Moreover, paragraph 29 also specifically excludes arbitration regarding the  
18          enforcement of a real property sales contract. Paragraph 29 states: "The following matters are  
19          excluded from arbitration hereunder: (a) a judicial or non-judicial foreclosure or other action or  
20          proceeding to enforce a .... real property sales contract as defined in Civil Code § 2985; ..."  
21          Thus, paragraph 29 does not apply to this issue.

22           **C. The Debtor's Unsupported Allegations Of Interference With Contract are**  
23           **Meritless.**

24          Debtor seems to cryptically allege that a third party at the foreclosure sale  
25          interfered with the UGI Purchase Contract. This assertion is wholly irrelevant to UGI and the  
26          return of the escrow deposit. Debtor then alleges UGI refused to "follow through" with the  
27          Purchase Contract by colluding with MF Fund II "to not close the escrow." Debtor's opposition  
28          brief, page 3, ll 21-23. Aside from the fact that there is no evidence to support such a conclusion,

1 it is undisputed the Debtor never obtained a Court order allowing the sale to proceed nor did the  
2 Court grant any motion to avoid liens to clear title for the escrow to close, an express requirement  
3 of the Purchase Contract. Numerous events proceeding this Motion in this Court show Debtor's  
4 allegations to be meritless. First, this Court has already held the Debtor could not prove he could  
5 close the alleged sale. The Debtor did not oppose the motion for relief to foreclose by Page and  
6 Buena Vista, junior lienholders on the Property. *See*, Docket Entry on June 17, 2014. The  
7 Debtor failed to oppose the motion for relief from the automatic stay of Capital One to also  
8 foreclose on the Property. Then, this Court rejected the Debtor's adversary proceeding seeking to  
9 restrain Page and Buena Vista Park from foreclosing. Thus, at every point in this case, the Court  
10 granted lienholders relief to foreclose and found the Debtor could not close on the UGI sale.

11 Arguing that UGI's refusal to close escrow was a collusive event is nonsensical as  
12 the Debtor never obtained a motion from this Court to allow the sale of the Property, or to allow  
13 the sale of Property free and clear of liens such that it could close.

14 **IV. CONCLUSION**

15 For the reasons set forth in UGI's Motion and this Reply, UGI respectfully  
16 requests that its Motion be granted and that the Court issue an order authorizing Old Republic  
17 Title to release the escrow deposit of \$50,000, or in the alternative to order the Debtor to sign  
18 releasing instructions directed at Old Republic Title to release the security deposit of \$50,000 to  
19 UGI, and for such other and further relief as the Court deems appropriate.

20 Dated: November 18, 2014

LUBIN OLSON & NIEWIADOMSKI LLP

21  
22 By: /s/ Dennis D. Miller

23 Dennis D. Miller  
24 Attorneys for Creditor  
25 URBAN GREEN INVESTMENTS, LLC  
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